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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

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This brief *amici curiae* is submitted by Thirty-Eight States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

IS THE EXERCISE OF THE COMMON LAW DOCTRINE OF COLLATERAL ESTOPPEL PREEMPTED BY THE PRIMA FACIE EVIDENTIARY STANDARD GRANTED AS A BENEFIT TO PRIVATE ANTITRUST PLAINTIFFS UNDER SECTION 5(a) OF THE CLAYTON ACT?

INTEREST OF AMICI CURIAE

The amici States are keenly interested in this proceeding because their Attorneys General are authorized and required by law to protect their citizens from the economic plunder of violators of the laws which establish free and open competition as a national policy. The decision of the Seventh Circuit significantly hinders the ability of the States to recover treble damages from antitrust violators in a judicially approved and efficient manner. The States, which rely in the first instance on their taxpayers to pay artificially high prices to antitrust violators who contract with the State, must now turn to their taxpayers a second time to pay for duplicative, lengthy and complex antitrust litigation to recover illegal overcharges. To be sure, it is the taxpayer, frequently represented in the past by State Attorneys General, *e.g., In re Antibiotic Antitrust Actions,* 333 F. Supp. 278 (S.D.N.Y. 1971), who is victimized both by the antitrust violation and by the judicial inefficiency which is caused by interpreting Section 5(a) as mutually exclusive of the doctrine of collateral estoppel.

The exclusionary reading of Section 5(a) by the Seventh Circuit creates several illogical inconsistencies in the application of the doctrine of collateral estoppel. Amici States which seek to effectively enforce the antitrust laws are placed at a disadvantage by the Seventh Circuit's construction of Section 5(a) where, as in the case presented, a prior United States Department of Justice criminal action has resulted in findings or pleas of guilt. Antitrust defendants adjudged guilty beyond a reasonable doubt will be able to relitigate their liability in a lengthy civil proceeding. States who are plaintiffs in these civil proceedings will be unable to prevent this expensive relitigation solely because they are *antitrust* plaintiffs. If these same States were plaintiffs in non-antitrust proceedings, they would be able to reap the savings which flow from the modern extension of the doctrine of collateral estoppel. *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 99 S. Ct. 645 (1979); *Butler* v. *Stover Bros. Trucking Co.,* 546 F. 2d 544 (7th Cir. 1977); *Plunkett* v. *C.I.R.,* 465 F. 2d 299 (7th Cir. 1972).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT ADDS UNNECESSARY COMPLEXITY AND DURATION TO ANTITRUST LITIGATION.

The complex and lengthy nature of antitrust litigation is well documented by many authorities in many sources. *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Hearings on H. R. 7905 (H. R. 8763) Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary,* 81st Cong., 2d Sess., sec. 14, pt, 5,

12 (1950); Seminar on Protracted Cases, 21 F.R.D. 395 (1957); Note, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial,* 43 U. Chi. L. Rev. 338 (1976).

Cases prosecuted by the United States Department of Justice include some of the most complex and lengthy. *See e.g., United States* v. *IBM,* 786 Antitrust & Trade Reg. Rep. (BNA) (1976); *United States* v. *Consolidated Packaging Corporation,* 575 F. 2d 117 (7th Cir. 1978); *Loew's, Inc.* v. *United States,* 339 U.S. 974 (1950); *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948); "Short Cuts" In Long Cases, 13 F.R.D. 41 (1951); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. Law & Econ. 365 (1970). Denying States who become civil litigants the collateral estoppel benefit of prior successful Government prosecutions will require them to again burden the federal judiciary with re-litigation of liability issues even prior to often complex proof of damages. Such a requirement is particularly illogical when compared to the operation of collateral estoppel in other contexts.

In *Parklane Hosiery Co.* v. *Shore, supra,* this Court approved the offensive use of collateral estoppel in federal civil litigation without requiring mutuality of parties. *Parklane* focused on a defendant's right to have a "full and fair" opportunity to litigate the claims against him. 99 S. Ct. at 652. Having been given one full and fair hearing, a defendant will be collaterally estopped from re-litigating the same issues in a subsequent suit brought by a third party.

Although this Court expressed reservations about the application of collateral estoppel in certain situations, 99 S. Ct. at 651, the *Parklane* decision, together with the

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation,* 402 U.S. 313 (1971), decision, fosters judicial economy by obviating the need for costly and time-consuming re-litigation of issues. There is no language in either of these cases suggesting that antitrust cases be excluded from the extension of the doctrine of collateral estoppel. On the contrary, Mr. Justice Rehnquist recognized in his dissent in *Parklane* that extension of the doctrine of collateral estoppel should reach private antitrust cases which follow Government actions. 99 S. Ct. at 662, n. 20.

In antitrust actions which are analytically different than the set of circumstances contemplated by Section 5(a), collateral estoppel will operate. When a State plaintiff first secures judgment after trial against antitrust violators, the United States Government could collaterally estop defendants in a subsequent civil antitrust action. When a private plaintiff successfully obtains a jury verdict against an antitrust defendant, a State or another civil litigant could benefit in a subsequent civil action by invoking collateral estoppel to streamline its case. *See J. M. Woodhull, Inc.* v. *Addressograph Multigraph Corp.,* 62 F.R.D. 58, 61 (S.D. Ohio, 1974); *Bill Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.,* 62 F.R.D. 381, 386 (S.D. Ohio 1973); *In re Gypsum Antitrust Cases,* Civil No. 46414-A (pretrial order dated December 22, 1971, N.D. Cal.).

The greatest incongruity of an exclusionary reading of Section 5(a) is underscored where the prior Government action is an FTC action under the Federal Trade Commission Act (FTCA). The FTCA is not, by definition, an "antitrust law" within the meaning of the Clayton Act. 15 U.S.C.A. § 3. *See Nashville Milk Co.* v. *Carnation Company,* 355 U.S. 373, 375-376 (1958). However, the FTC

may challenge anticompetitive activities either under the FTCA or under an antitrust law, such as the Sherman Act. Courts have distinguished the effects of Section 5(a) of the Clayton Act on FTC actions under the FTCA and under the Sherman Act. *Y & Y Popcorn Supply Co.* v. *ABC Vending Co.*, 263 F. Supp. 709, 711-712 (E.D. Pa. 1967); *Lippa's, Inc.* v. *Lenox, Inc.*, 305 F. Supp. 182, 186 (D. Vt. 1969). Consequently, if the Federal Government chooses to attack an unfair method of competition through the FTC and its FTCA, a subsequent private antitrust litigant could invoke the doctrine of collateral estoppel under the *Parklane* decision. On the other hand, if the Federal Government obtains a judgment by the FTC or DOJ under one of the "antitrust laws," Section 5(a) would limit a private antitrust litigant to prima facie usage of that judgment. In short, it is illogical to alter the doctrine of collateral estoppel with the name of a party plaintiff and the name of a statute under which that party sues.

The duplication and delay occasioned by re-litigation of liability issues aids only those who have already been adjudged to be in violation of the antitrust laws. Antitrust defendants maintain use of their illegal profits and ultimately pay a civil judgment in deflated dollars without interest. This is particularly significant where re-litigation of liability could take months or years. For example, IBM earns an estimated $5,000,000 to $9,000,000 in additional profit for each day the *United States* v. *I.B.M.* monopoly trial continues. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 344 (1977) (Opening Remarks of Senator H. Metzenbaum.) Not only is additional trial time required, but also discovery is complicated and prolonged. Especially in a time of heightened tax consciousness,

amici States are concerned over the unnecessary expenditure of tax dollars such duplicative proceedings would require.

II.

THE DECISION OF THE SEVENTH CIRCUIT MISINTERPRETS THE CONGRESSIONAL INTENT IN ENACTING SECTIONS 4 AND 5(a) OF THE CLAYTON ACT AND UNNECESSARILY CURBS THE COMPLEMENTARY RELATIONSHIP OF STATUTORY LAW AND COMMON LAW.

A.

Congressional Intent.

Section 4 of the Clayton Act was originally enacted as Section 7 of the Sherman Act in 1890. Through this Section, Congress intended that persons "injured" would be able to bring damage actions against price-fixers and not rely entirely on Government action. Much of the debate of that 51st Congress addressed the means by which procedural burdens of private litigants could be eased. *See* 21 Cong. Rec. 2612-3149.

Similarly, the enactment of Section 5 in 1914 was an attempt by Congress to ease a private plaintiff's burden to the extent then thought constitutionally permissible. *See* 51 Cong. Rec. 9200, 13853, 15939, 16058. The requirement of mutuality of parties was still a part of the doctrine of collateral estoppel and was thought to bar a House version which provided that a prior Government action be given conclusive effect in a private antitrust suit. Consequently, Congress settled on a prima facie benefit for subsequent private litigants. Petitioner State of Illinois

correctly and more completely discusses the intent of the 1914 Congress and, in the interest of judicial economy, amici will adopt that argument.

B.

Section 5(a) And Common Law Collateral Estoppel Are Complementary.

The ultimate irony of the Seventh Circuit's decision is that, by interpreting Section 5(a) as exclusionary of the common law, a statute which was intended to confer a unique benefit upon antitrust plaintiffs now acts as a burden to antitrust plaintiffs. The Seventh Circuit reaches this result by viewing Section 5(a) and the common law doctrine of collateral estoppel as disjunctive rather than complementary. Such a view is wholly unwarranted.

It is a rule of statutory construction that common law rights and remedies which are not inconsistent with a statutory scheme are preserved. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Statutes should not be construed as limiting these common law rights and remedies beyond the statute's express terms. *Shaw* v. *North Penn R. Co.*, 101 U.S. 557 (1880). *Cf. Moragne* v. *States Marine Line*, 398 U.S. 375 (1970). In enacting Section 5(a) of the Clayton Act, Congress did not expressly limit the common law doctrine of collateral estoppel, a rule of the substantive law of judgments. *See e.g.*, Advisory Committee's Note to Fed. R. Evid. 803 (22). On the contrary, Congress attempted to aid private antitrust plaintiffs with the prima facie benefit from the law of evidence. These two notions are not in conflict; rather, they are complementary.

The complementary nature of these concepts was alluded to by the court in *McCook* v. *Standard Oil of California*, 393 F. Supp. 256 (C.D. Cal. 1975). Without the benefit of this Court's *Parklane* decision, the Court held that the prior, non-jury FTC proceeding could not collaterally estop a defendant in a subsequent private antitrust action. In addressing the relationship of Section 5(a) to the doctrine of collateral estoppel, the Court noted that legislative history of Section 5(a) suggested that:

> . . . Congress only intended to set a minimum standard for the effect of prior government antitrust judgments, thereby leaving the courts free to apply in accord with constitutional limitations any common law doctrine which would increase the effect of the prior judgment beyond the prima facie evidence standard.

393 F. Supp. at 259.

In denying for other reasons a defendant's motion to collaterally estop a private plaintiff from pleading a prior FTC ruling, another district court anticipated the irony of the Seventh Circuit's opinion by observing:

> It seems odd that a statutory provision which was enacted to strenghen antitrust plaintiffs should now be interpreted to make them worse off in many cases than they would have been without the enactment.

Fleer Corp. v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 185 (E.D. Pa. 1976), *appeal dismissed*, (3rd Cir.), *cert. denied* —— U.S. ——, 98 S. Ct. 1611 (1978).

CONCLUSION

Because of the importance of the question presented for the efficient enforcement of the antitrust laws in the United States and by the several States, and because of the unwarranted emasculation of the doctrine of collateral estoppel as applied to antitrust plaintiffs, the petition of the State of Illinois for writ of certiorari to the Seventh Circuit Court of Appeals should be granted.

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